Fong Choon San v Timbalan Menteri Dalam Negeri & Ors

HIGH COURT (IPOH) — CRIMINAL APPLICATION NO 44–17–03 OF 2016
SM KOMATHY JC
6 OCTOBER 2016

Criminal Procedure — Habeas Corpus — Application for — Applicant detained under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 — Police officer acted as interpreter in inquiry — Inquiry officer issued report under s 5(4) of the Act — Deputy Minister of Internal Security ordered for detention of applicant under s 6 of the Act — Order affirmed by Yang di-Pertuan Agong — Whether s 5(1) of the Act expressly precluded police officer to act as interpreter in inquiry proceedings — Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3, 5, 6 & 11C

The applicant was arrested and remanded by the police to assist in the investigations under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The inquiry officer then conducted inquiry and issued a report under s 5(4) of the Act. It was common ground that D/Koperal Wee Chin Haw, a police officer from the Narcotics Branch had acted as a Chinese interpreter in the inquiry proceedings to assist the inquiry officer. The Deputy Minister of Internal Security then made an order under s 6 of the Act directing that the applicant be detained for two years. The detention was later affirmed by the Yang di-Pertuan Agong on the recommendations of the advisory board. Aggrieved by the detention order, the applicant filed the present action and sought for a writ of habeas corpus for his release from detention. The primary ground for the present action was founded on s 5(1) of the Act, namely that it was not permissible for a police officer to act as an interpreter in inquiry proceedings.

Held, allowing the application for habeas corpus and releasing the applicant:

(1) Though s 5 of the Act does not expressly preclude the use of police officers as interpreters, it is implicit in the said provision that only an independent interpreter who is uninterested in the outcome may be used in inquiry proceedings. A police officer from the Narcotics Department would not meet the requirement of an independent interpreter as there was a likelihood of bias arising from the fact that it was the narcotics department that had investigated and found evidence that the applicant was associated with activity relating to or involving the trafficking in dangerous drugs. There was a presumption that he could not be free of bias (see para 17).

(2) The report prepared by the inquiry officer became tainted as a result of the failure to use an independent interpreter. This report played a significant role in the making of the detention order against the applicant as the Minister had considered the report in making the order. It amounted to a procedural requirement governing the exercise of discretion by the Minister in making a detention order within the meaning of s 11C of the Act. A breach of this requirement was therefore subject to judicial review (see para 19).

[Bahasa Malaysia summary

Pemohon ditangkap dan ditahan oleh polis untuk membantu dalam penyiasatan di bawah s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta'). Pegawai siasatan kemudiannya menjalankan siasatan dan mengeluarkan laporan di bawah s 5(4) Akta. Ia adalah alasan biasa bahawa D/Koperal Wee Chin Haw, pegawai polis daripada Cawangan Narkotik telah bertindak sebagai jurubahasa Cina di dalam prosiding siasatan untuk membantu pegawai siasatan. Timbalan Menteri Keselamatan Dalam Negeri kemudian membuat perintah di bawah s 6 Akta mengarahkan bahawa pemohon ditahan untuk selama dua tahun. Tahanan kemudiannya disahkan oleh Yang di-Pertuan Agong atas cadangan lembaga penasihat. Tidak puas hati dengan perintah tahanan, pemohon memfailkan tindakan ini dan memohon writ habeas corpus bagi pelepasannya daripada tahanan. Alasan utama bagi tindakan ini adalah diasaskan atas s 5(1) Akta, iaitu bahawa ia adalah tidak dibenarkan bagi pegawai polis untuk bertindak sebagai jurubahasa di dalam prosiding siasatan.

Diputuskan, membenarkan permohonan bagi habeas corpus dan melepaskan pemohon:

(1) Walaupun s 5 Akta tidak secara nyata mengecualikan penggunaan pegawai polis sebagai jurubahasa, ia adalah tersirat dalam peruntukan tersebut bahawa hanya jurubahasa bebas yang berminat dalam keputusan boleh digunakan dalam prosiding siasatan. Pegawai polis daripada Jabatan Narkotik tidak akan memenuhi keperluan jurubahasa bebas kerana kemungkinan berat sebelah berbangkit daripada fakta bahawa ia adalah jabatan narkotik yang menyiasat dan mendapati keterangan bahawa pemohon dikaitkan dengan aktiviti berhubung atau terlibat dalam pengedaran dadah berbahaya. Terdapat anggapan bahawa dia tidak akan bebas daripada berat sebelah (lihat perenggan 17).

(2) Laporan yang disediakan oleh pegawai polis menjadi tercemar akibat kegagalan untuk menggunakan jurubahasa bebas. Laporan ini memainkan peranan penting dalam membuat perintah tahanan terhadap pemohon kerana Menteri telah mempertimbangkan laporan tersebut dalam membuat perintah. Ia merupakan kehendak prosedur mengawal pelaksanaan budi bicara oleh Menteri dalam membuat perintah tahanan

dalam maksud s 11C Akta. Perlanggaran terhadap kehendak ini oleh itu tertakluk kepada semakan kehakiman (lihat perenggan 19).]

Notes

For cases on application for habeas corpus, see 5(2) *Mallal's Digest* (5th Ed, 2015) paras 2457–2463.

Cases referred to

Cheong See Leong v PP [1948-1949] supp MLJ 56, CA (refd)
Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 3 CLJ 914; [2004] AMEJ 0130; [2005] 1 MLRA 692, FC (folld)
SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 2 MLRA 631; [2010] 3 AMR 781, FC (folld)
Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong Beng Chuan [2006] 6 MLJ 493; [2006] 4 CLJ 703; [2006] 2 MLRA 239, FC (folld)

Legislation referred to

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), (2)(c), (3), 5, 5(1), (4), 6, 6(1), 10(1), 11C
Emergency Regulations Ordinance 1948 reg 6(1)

Jagjit Singh (Naizatul Zamrina bt Karizaman with him) (KL Chee & Co) for the applicant.
Norsiah bt Ujang (Lee Wai Yee with her) (Federal Counsel, Ministry of Home Affairs) for the respondents.

SM Komathy JC:

[1] By a notice of motion dated 23 March 2016, the applicant Foong Choon San seeks a writ of habeas corpus for his release from detention.

BACKGROUND FACTS

[2] The applicant was arrested and remanded by the police in October 2015 to assist in investigations under s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). Upon the completion of the investigation report under s 3(3), it was submitted to the inquiry officer, Dzul Iswari bin Mohd Jaafar, who conducted an inquiry and issued a report under s 5(4) of the Act.

[3] On 30 December 2016, the Deputy Minister of Internal Security, Datuk Nur Jazlan bin Mohamed, the first respondent here, made an order under s 6 of the Act directing that the applicant be detained at the Simpang Renggam Rehabilitation Centre Johor for a period of two years. Section 6(1) of

the Act which provides:

> Whenever the Minister, after considering —
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> (a) the complete report of investigation submitted under subsection 3(3); and
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> (b) the report of the Inquiry Officer submitted under subsection 5(4),
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> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

[4] The applicant made representations against the detention order to the advisory board. On 7 March 2016, the advisory board considered the representations and made recommendations to the Yang di-Pertuan Agong, who on 8 March 2016, affirmed the detention order issued by the Deputy Minister of Home Affairs.

GROUNDS IN SUPPORT OF APPLICATION

[5] The applicant alleged that his detention under the Act was unlawful on the following grounds:

(a) non-compliance with the objective and spirit of s 5(1) of the Act by allowing a police officer from the Narcotics Branch to act as an interpreter in the inquiry proceedings;

(b) non-compliance with s 10(1) of the Act in failing to identify the coram that heard the applicant's representation. There were two notices of hearing issued to him and it was thus incumbent on the respondents to disclose the coram that dealt with his representation;

(c) non-compliance with s 3(2)(c) of the Act as there was a failure to mention who forwarded the report to Deputy Commissioner of Police ('DCP') Dato' Pahlawan Mohd Dzuraidi bin Ibrahim;

(d) non-compliance with s 6(1) of the Act in that the date the Deputy Minister was satisfied that the detention order be issued was not stated; and

(e) non-compliance with r 5(1) in that there was no mention of the person who actually signed and issued the notice of hearing in Form II.

[6] Counsel for the applicant informed the court that the primary ground on which the detention was challenged was (a) predicated on s 5(1), namely that it was not permissible for a police officer to act as an interpreter in inquiry proceedings.

THE APPLICABLE PRINCIPLES

[7] The only ground on which a person can seek an order of habeas corpus is set out in s 11C of the Act. It provides:

> (1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.
>
> (2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in section 6A.

[8] It is clear from the foregoing that the only ground on which the applicant can challenge the detention order issued against him is procedural non-compliance in the making of the said order.

[9] In *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 2 MLRA 631; [2010] 3 AMR 781 the Federal Court held that on an application for habeas corpus the burden of satisfying the court that the detention is lawful lies throughout on the detaining authority.

[10] In *Lee Kew Sang v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914; [2004] AMEJ 0130; [2005] 1 MLRA 692, Abdul Hamid Mohamad FCJ elucidated what amounts to procedural non-compliance as follows:

> ... the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts to create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there can be non-compliance thereof and only then that the courts should consider whether, on the facts, there has been non-compliance.

[11] In *Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors v Ong Beng Chuan* [2006] 6 MLJ 493; [2006] 4 CLJ 703; [2006] 2 MLRA 239 the Federal Court explained the distinction between a mandatory and directory procedural requirement:

> A right to judicial review when there is a breach of a procedural requirement in the making of a detention order under the Act was considered by this court in *Muhammad Jailani bin Kasim v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 6 MLJ 403; [2006] 4 CLJ 687 (FC) in the following words:

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> It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee.

B

[12] Guided by these principles, I turn to consider the submissions of the applicant.

C

WHETHER THERE WAS NON-COMPLIANCE WITH S 5(1)

[13] As already stated, the primary issue is the applicant's contention that a police officer cannot be permitted to act an interpreter in inquiry proceedings under the Act. It was common ground that D/Koperal Wee Chin Haw ('D/Koperal Wee'), a police officer from the Narcotics Branch had acted as a Chinese interpreter in the inquiry proceedings to assist Dzul Iswari.

D

[14] The applicant conceded that s 5(1) did not expressly preclude a police officer from acting as an interpreter, but contended that this was the intent, purpose and spirit of the said provision. The requirement in s 5(1) that a police officer was not to be appointed as a inquiry officer demonstrated that it was the intention of the Legislature that the police were not to be involved in the inquiry proceedings. The applicant was denied the right to have an independent interpreter to interpret his statement. The independence and integrity of the inquiry proceedings had been comprised with the involvement of D/Koperal Wee as there was a strong likelihood of D/Koperal Wee being biased.

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[15] In response, the federal counsel countered by contending that D/Koperal Wee had not participated in the inquiry proceedings but had merely interpreted the applicant's answers to the inquiry officer. Detective Koperal Wee had no interest in the matter and there was no basis to question his impartiality or the accuracy of his interpretation. It was further argued that the mere fact that D/Koperal Wee was from the Narcotics Department did not warrant the presumption that he was biased in his interpretation.

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[16] As the issue for determination here relates to violation of s 5(1) of the Act it is best that I set out the provision in full. It reads:

I

> (1) There shall be appointed by the Minister in writing such number of Inquiry Officers as may be necessary for the purposes of this Act:
>
> Provided that no police officer nor any person who is not legally qualified shall be appointed to be an inquiry Officer.

[17] It cannot be gainsaid that one of the reasons for the requirement under s 5(1) of the Act for the inquiry officer to be a non police officer who is legally qualified is to ensure that the person who conducts the inquiry is one who is independent and impartial. Though s 5 does not expressly preclude the use of police officers as interpreters, in my view, it is implicit in s 5 that only an independent interpreter who is uninterested in the outcome may be used in inquiry proceedings. A police officer from the Narcotics Department would not meet the requirement of an independent interpreter as there is a likelihood of bias arising from the fact that it was the Narcotics Department that had investigated and found evidence that the the applicant was associated with activity relating to or involving the trafficking in dangerous drugs. There is a presumption that he cannot be free of bias.

[18] It is instructive in this regard to refer to the judgment of the Court of Appeal on the test an interpreter must meet in order to ensure that there is no breach of justice. In *Cheong See Leong v Public Prosecutor* [1948-1949] supp MLJ 56, the appellant was convicted of an offence under reg 6(1) of the Emergency Regulations Ordinance 1948. At the trial evidence was given of a statement of the appellant alleged to have been made to one Insp Hussain through the interpretation of a Detective Sergeant, who was a member of the police party which raided the hut where the appellant and one other person were found. In making the statement the appellant spoke in Hakka and the sergeant interpreted into Malay to Insp Hussain who wrote the statement down in English. On appeal, it was argued that the statement of the accused should not have been admitted in evidence. In allowing the appeal, Spenser Wilkinson J, observed:

> The only practicable way in which one person can make a statement to another in a language that the latter does not understand is either by signs or through interpretation. In the ordinary way an independent interpreter is, as the learned trial judge pointed out, uninterested in the subject matter and may be taken as being a mere 'conduit-pipe' incapable of invention to the detriment of the accused. A statement thus made through a mere 'conduit-pipe' by an accused to a Police Inspector is, in our view a statement properly made by him to the Inspector.
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> If, however, the interpreter used, instead of being a mere 'conduit-pipe' has an interest in the subject matter then we are brought to the consideration of the second point raised by the learned trial Judge in the extract above quoted that he might be open to a temptation to improve or embellish the case. We must, therefore, consider the effect of such a possibility upon the proceedings.
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> There are numerous decided cases which have laid down the principle that judicial officers are required to be free from bias when adjudicating on any particular case before them. Those cases have decided that when a judicial officer is interested in the subject matter of any case before him the presumption is that he cannot be free from bias. It may be, in such a case, that his adjudication has been free from all bias. That is not the test. The test is whether there is a likelihood of bias arising from his interest in the subject matter. If there is that likelihood then his adjudication cannot stand.

In other words, the test is whether a judicial officer is so interested in the case that he should not have sat to adjudicate upon it. We think that the same principles must be applied in regard to interpreters in a case such as this.

The only authority which was cited to us on the question of interpretation was the case of *Ah Soi v King Emperor* 1926 AIR Calcutta 922. In that case a witness who had personally interested himself in the police investigations and himself gave evidence before the committing magistrate and again in the sessions court was used as interpreter for the other witnesses in the latter court. In the judgment in that case the following remark was made:

> The procedure adopted by the learned Sessions Judge has had the effect of placing the accused more or less at the mercy of the interpreter ...

It was held that the procedure adopted was opposed to elementary ideas of justice.

In the case before us the statement of the appellant was interpreted by Detective Sergeant No 180 who, as appears from the record, was fully conversant with all the material facts and was subsequently called by the prosecution as their principal witness to prove those facts. Accordingly there is no doubt that he had a real interest in the subject matter of that statement. Hence applying the above-mentioned test there was the likelihood of bias when he interpreted.

We have no doubt this offends against the elementary ideas of justice and therefore no reliance can be placed on the accuracy of that statement. Without it as found by the learned trial Judge there is not sufficient evidence to support the conviction.

[19] I consider that the absence of a statutory provision in s 5(1) of the Act against the use of a police officer from the narcotics department as an interpreter in inquiry proceedings does not preclude this breach not being subject to judicial review. Irregularities which are not infringements of any specific statutory provision, in my view, can also amount to procedural requirements if they are part of the decision making process. In this case, the report prepared by the inquiry officer became tainted as a result of the failure to use an independent interpreter. This report played a significant role in the making of the detention order against the applicant. The Minister had considered the report in making the order. It amounts to a procedural requirement governing the exercise of discretion by the Minister in making a detention order within the meaning of s 11C of the Act. A breach of this requirement is therefore subject to judicial review.

[20] It follows that in my view the applicant's contentions on the primary issue must prevail. In my view of my conclusion on the primary issue, I find that the other grounds do not fall for consideration.

CONCLUSION

[21] I therefore allow the application for habeas corpus and order that the applicant be released.

Application for habeas corpus allowed; applicant released.

Reported by Dzulqarnain Ab Fatar